

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**ORIGINAL**

DEC - 4 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Amendment of the Commission's )  
Rules to Establish Part 27, the )  
Wireless Communications Service )  
("WCS") )

GN Docket No. 96-228

To: The Commission

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COMMENTS OF  
COOK INLET REGION, INC.

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## SUMMARY

Cook Inlet Region, Inc. ("CIRI") urges the Commission to renew its commitment to a responsible designated entity program and to support the mainstream participation of small businesses in wireless services. The Commission appears to have dismissed the need for small business preferences in connection with recent spectrum licensing; CIRI encourages the Commission to correct this course by offering substantial small business bidding credits in its forthcoming spectrum auctions. CIRI also urges the Commission not to rely on partitioning and disaggregation as substitutes for meaningful small business provisions.

To develop a small business regime before April, 1997, the Commission should turn to the eligibility and preference provisions in its broadband PCS auctions rules. In this regard, however, recent auctions suggest that set aside spectrum blocks and installment payment plans may not be responsible small business preferences. In particular, the availability of government financing without an evaluation of credit-worthiness has fostered speculation in the small business auctions.

Thus, the Commission should include substantial small business bidding credits in its forthcoming auction rules in lieu of set asides and installment payment plans. CIRI also urges the Commission to include its affiliation exemption for Alaska Native Corporation and Indian Tribes with any new small business provisions. Finally, the Commission should regulated the use of WCS for mobile services under the CMRS spectrum cap.

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COMMENTS

Cook Inlet Region, Inc. ("CIRI"), pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the captioned Notice of Proposed Rule Making ("NPRM"), adopted by the Commission on November 8, 1996, and released on November 12, 1996.

I. INTRODUCTION

CIRI has long been an active supporter of responsibly managed government efforts to encourage minority and small business participation in the communications industry. Since the advent of the Commission's spectrum auction proceedings, CIRI has been a strong proponent of what became the Commission's entrepreneurs' block rules. In Comments and Reply Comments<sup>1</sup> in PP Docket 93-253, for example, CIRI demonstrated that preferences to assist businesses owned by members of minority groups would survive the intermediate scrutiny analysis then called for under

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<sup>1</sup>. Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 10, 1993); Reply Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 30, 1993).

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 (1990).<sup>2</sup> In a Written Statement to the Commission's personal communications service ("PCS") Task Force in April, 1994, CIRI demonstrated the need for preferential measures and submitted statistical data illustrating the lack of minority participation in the telecommunications industry.<sup>3</sup> Similarly, CIRI Senior Vice President Margaret Brown testified before the Subcommittee on Minority Enterprise, Finance and Urban Development in May, 1994, about the problems that plague Native Americans in particular and the need for preferential measures in the telecommunications industry for members of minority groups.<sup>4</sup> Most recently, CIRI urged the Commission to increase opportunities for responsible small bidders in the remaining broadband PCS auctions and to

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<sup>2</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2398-2400 (1994) (citing CIRI constitutional analysis of minority preferences).

<sup>3</sup> Written Statement of Cook Inlet Region, Inc., GEN Docket 90-314 (submitted April 22, 1994) (with twelve attachments).

<sup>4</sup> Discrimination in the Telecommunications Industry: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. 55-56 (1994) (statement of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc.). Ms. Brown's testimony was filed with the Commission by Chairman Mfume on May 31, 1994 and was cited by the Commission in its Order on Reconsideration in PP Docket 93-253. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 n.13 (1994) ("Order on Reconsideration").

determine whether its minority preferences would survive strict scrutiny.<sup>5</sup>

Against this background, CIRI strongly urges the Commission to develop opportunities for small businesses in its spectrum auction rules for the Wireless Communications Service ("WCS") and for all forthcoming auctions. The Commission itself will create barriers to entry if it abandons the designated entity programs mandated by Congress in Section 309(j). CIRI agrees with the Commission's frequent determinations that small business preferences also frequently aid minority and women-owned businesses without raising substantial constitutional implications, and CIRI urges the Commission to adopt such preferences here. Well-crafted small and minority-owned business opportunities will genuinely help the Commission to reduce barriers to entry to emerging services without sacrificing value in the auction context or affecting the rapid development of new services. CIRI urges the Commission to renew its commitment to a responsible — and responsive — small business auction policy.

## **II. TREATMENT OF DESIGNATED ENTITIES**

### **A. The Commission Must Include a Small Business Preference Component in its Auction Rules for WCS Spectrum**

CIRI urges the Commission to include a small business preference component in its auction rules for WCS spectrum. In particular, CIRI notes that in the NPRM the Commission requests

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<sup>5</sup>. Comments of Cook Inlet Region, Inc., WT Docket No. 96-59 (submitted Apr. 15, 1996); Reply Comments of Cook Inlet Region, Inc., WT Docket No. 96-59 (submitted Apr. 25, 1996).

comment on "the extent to which potentially high capital costs for constructing WCS systems affect the advisability of adopting specific provisions applicable to the WCS auction."<sup>6</sup> On this point, CIRC encourages the Commission not to dismiss the need for small business preferences in the face of countervailing interests.

For example, in its Notice of Proposed Rulemaking in the Digital Audio Radio Service ("DARS") proceeding, the Commission also requested comment on whether to include special measures for designated entities in the DARS context.<sup>7</sup> In particular, the Commission noted there that its determination of whether to provide for designated entities would turn in part upon the "characteristics of . . . a specific spectrum-based service,"<sup>8</sup> and pointed to its resolution of the issue in its Big low-Earth orbit ("LEO") satellite service rulemaking as representative of the circumstances mitigating against such preferences.<sup>9</sup>

In the Big LEO rulemaking, however, the Commission determined that it would be burdensome to reopen the Big LEO application window to designated entities because the Commission

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<sup>6</sup>. NPRM at ¶ 62.

<sup>7</sup>. Establishment of Rules and Policies for the Digital Audio Radio Service in the 2310-2360 MHz Frequency Band, Notice of Proposed Rulemaking, FCC 95-229, ¶ 108 (rel. June 15, 1995).

<sup>8</sup>. Id. at ¶ 106.

<sup>9</sup>. Id. at ¶ 108 n.117.

was committed to a specific licensing date.<sup>10</sup> Specifically, the Commission reasoned that reopening the application window to designated entities would hinder its ability to see that "needed service is made available as quickly as possible" and "for the United States to continue its leadership role in promoting global development through an enhanced global information infrastructure."<sup>11</sup> On that basis, the Commission did not undertake to craft a designated entity program.

Perhaps even more troubling was the Commission's decision in its Direct Broadcast Satellite ("DBS") proceeding completely to forego designated entity provisions in the auction for channels at 110° and 148° on the theory that the costs to implement that service simply were too high.<sup>12</sup> Again, the Commission viewed the need for an immediate auction as paramount.<sup>13</sup> Although the Commission indicated that "[n]o commenters assert[ed] that small businesses could attract the capital necessary to provide service on all the channels available,"<sup>14</sup> the absence of small business provisions rendered that a self-fulfilling judgment. Without

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<sup>10.</sup> Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, Report and Order, 9 FCC Rcd 5936, 5969-70 (1994).

<sup>11.</sup> Id.

<sup>12.</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, Report and Order, FCC 95-507, ¶¶ 214, 217 (rel. Dec. 15, 1995).

<sup>13.</sup> Id. at ¶ 214.

<sup>14.</sup> Id. at ¶ 216.



small business provisions, new market entrants frequently have little sway with capital markets. With small business provisions, the broadband PCS auctions provided compelling evidence that responsible small businesses can attract the capital necessary for a satellite-based service.<sup>15</sup>

Thus, CIRI strongly urges the Commission not to travel the same road in the WCS context. If credit-worthy small businesses cannot compete for WCS licenses — even with Commission preferences — then the market will bear that out. If the Commission is concerned that a smaller business cannot implement a large satellite-based service, then the Commission should limit the availability of auction preferences to smaller businesses with particularly strong credit backgrounds. If the Commission desires an immediate auction, then the Commission should adapt an existing small business preference regime, such as that from broadband PCS. What the Commission should not do is to presume that a small business cannot compete and then craft rules making that a reality.

This is particularly important in the case of WCS, which may be used to provide DARS. New Section 257 of the Communications

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<sup>15</sup>. In its Notice of Inquiry in the small business market entry barriers proceeding, the Commission noted concerns that the high bid amounts for the C block auction could create operating difficulties for C block licensees in the future. Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, FCC 96-216, ¶ 42 (rel. May 21, 1996). To be certain, it would be an odd result to exclude small businesses from auctions for more capital-intensive services on the theory that successful bidding would yield build-out problems. That is a true no-win situation for smaller entities.

Act directs the Commission, among other things, "to promote the policies and purposes of this Act favoring diversity of media voices . . . ." <sup>16</sup> To the extent that the Commission's small business provisions frequently encourage the participation of businesses owned by members of minority groups, the Commission has the chance to promote the important and well-recognized value of a diversity of media voices in a nationwide, virtual-broadcast context. The Commission worked quite hard to prepare and defend minority — then small — business preferences in the broadband PCS arena. The inherent value of such preferences as part of a national policy is magnified substantially in the DARS proceeding.

Even more importantly, the recently enacted Federal Budget Act directs the Commission to begin the auction of WCS spectrum by April, 1997, and to do so "pursuant to section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j))." <sup>17</sup> Section 309(j) is clear. The Commission must undertake to promote:

economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. <sup>18</sup>

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<sup>16</sup> 47 U.S.C. § 257(b).

<sup>17</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996).

<sup>18</sup> 47 U.S.C. § 309(j)(3)(B).

Thus, the Commission has both the opportunity and the duty to include small businesses in its upcoming auction of WCS spectrum.

**B. Partitioning and Disaggregation are not Substitutes for Mainstream Participation by Small Businesses**

In the NPRM, the Commission notes that its proposed partitioning and disaggregation rules may provide designated entities with opportunities to participate in the provision of wireless services such as WCS.<sup>19</sup> Although the Commission's partitioning and disaggregation policies are important tools to permit flexible wireless service offerings, partitioning and disaggregation are not substitutes for mainstream participation by small businesses. The Commission will not satisfy its Section 309(j) obligations by relying on private market license splintering.

Rather, as noted above, CIRI urges the Commission to support greater mainstream participation for smaller businesses by making small business provisions available in all spectrum blocks in all auctions. Bidding credits for businesses under a certain size will provide designated entities with an opportunity to compete for more commercially attractive wireless services. If established telecommunications companies ultimately outbid the smaller businesses for those authorizations, the Commission will still have done its job. There are many wireless services yet to be auctioned by the Commission, and small businesses will have diverse opportunities to participate in the wireless market. The

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<sup>19.</sup> NPRM at ¶ 62.

Commission should not narrow those opportunities with a self-fulfilling prediction that a given service is not suitable for small business competition.

When the Commission looks to partitioning and disaggregation opportunities as surrogates for meaningful small business preferences, however, the Commission does just that. A determination that splintered licenses will be available in the post-auction private market is as much a prediction as the decision that a given service is too capital-intensive for small businesses. The Commission does not — and cannot — know what will be within the reach of small businesses during or after an auction event. On that basis, CIRI urges the Commission to make small business bidding credits available in all auctions and not to rely on partitioning and disaggregation as a substitute.

### **III. SPECIFIC SMALL BUSINESS PREFERENCES**

#### **A. The Commission Should Look to its Existing Broadband PCS Auction Rules**

To develop a small business regime during the short period before April, 1997, CIRI urges the Commission to look to its existing small business provisions in the broadband PCS Rules.<sup>20</sup> With aggregate net bids in excess of \$10 billion, the broadband PCS C block auction demonstrated that smaller businesses can attract the capital necessary to bid for more expensive authorizations when provisions to facilitate market entry are in

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<sup>20.</sup> See 47 C.F.R. §§ 24.709, 24.716, 24.717, 24.720.

place. CIRI encourages the Commission to utilize these provisions to assist small businesses in connection with WCS.

In particular, CIRI recommends that the Commission employ the eligibility levels set forth in Section 24.709 of its Rules and the attendant definitions in Section 24.720. CIRI also urges the Commission to employ the control group minimum 25 and 50.1 percent equity requirements set forth in Section 24.709. In June, 1996, the Commission extended the use of these control group equity structures to the F block auction based in part on the determination that to do so "continues equity structures that are familiar to the industry and financial community."<sup>21</sup> In this regard, many broadband PCS C or F block bidders may bid in the WCS auction to acquire spectrum that was not available to them in the previous auctions. Continuing to employ familiar eligibility and equity structures in the WCS context will assist these smaller entities in attracting capital for this effort just as it did for the F block auction.

CIRI also urges the Commission to offer significant bidding credits to small businesses as set forth in Section 24.717 of its Rules, with one amendment. If the Commission determines that installment payment plans would be inappropriate in the WCS auction,<sup>22</sup> the Commission should increase the bidding credits

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<sup>21</sup>. Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap. Report and Order, 11 FCC Rcd 7824, 7838 (1996) (footnote omitted) ("D, E, F Block Order").

<sup>22</sup>. NPRM at ¶ 63.

available to small businesses by 10 percent. Thus, "very small businesses" — as defined in Section 24.720 — would receive a 35 percent bidding credit to lower the cost of their winning bids and "small businesses" would receive a 20 percent bidding credit. As discussed below, installment payment plans may no longer represent sound small business policy; the lack of such a plan will affect the participation of smaller businesses without a material increase in bidding credits.

Finally, CIRC recommends that the Commission employ the antitrafficking restrictions developed for broadband PCS authorizations, set forth in Section 24.839(d) of its Rules. Meaningful small business participation is impeded if licenses secured with the help of Commission preferences can be sold to non-designated entities without limitation.

**B. Set Aside Blocks and Installment Payments May No Longer Be Responsible Small Business Provisions**

Although CIRC has generally supported a full range of designated entity preferences for the Commission's spectrum auction process, CIRC now suggests that set aside spectrum blocks and installment payments may no longer be responsible small business provisions. With regard to set aside blocks, CIRC urges the Commission to "mainstream" the participation of smaller businesses by offering bidding credits in all spectrum blocks for all services. As discussed above, the Commission should no longer selectively remove barriers to entry to meaningful small business competition.

With regard to installment payment plans, CIRI recognizes that the lack of access to capital frequently limits the ability of smaller businesses to compete with established telecommunications companies. The Commission's installment payment plans were designed to help to overcome that limitation. Nevertheless, the availability of free credit (i.e., financing available without a determination of the debtor's credit-worthiness) has fueled marked speculation in the designated entity auction context. The Commission and the Department of the Treasury must now administer substantial loans made to companies without a credit background. Unless the Commission is prepared to establish the credit-worthiness of installment payment applicants, CIRI urges the Commission widely to offer substantial bidding credits to small businesses in lieu of government financing.

**C. The Commission Must Include its Tribal Affiliation Exemption Among Any Small Business Provisions**

Finally, a critical element of the Commission's small business preferences continues to be its affiliation exemption for concerns owned by Alaska Native Corporations and Indian Tribes.<sup>23</sup> Federal law specifically directs the Small Business Administration ("SBA") — which has primary jurisdiction over such programs — to calculate the "size" of any entities owned by an Indian tribe "without regard to its affiliation with the tribe, any entity of the tribal government, or any other business

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<sup>23</sup>. See 47 C.F.R. § 24.720(1)(11)(i).

enterprise owned by the tribe . . . ." <sup>24</sup> Pursuant to the direction of Congress, the SBA's Rules provide that, for size determination purposes, "concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601) . . . are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership." <sup>25</sup> The same exemption is included in the SBA's size standard guidelines for its 8(a) Program. <sup>26</sup>

As part of its detailed use of SBA size standards in the broadband PCS context, the FCC adopted its tribal affiliation rule in 1994 to "mirror[] this congressional mandate." <sup>27</sup> The Commission twice has reaffirmed this tribal affiliation exemption since the Supreme Court's 1995 decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995), recognizing that the exemption is unaffected by the Adarand decision. <sup>28</sup> The SBA also just completed a comprehensive overhaul of its small business

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<sup>24</sup>. 15 U.S.C.A. § 636(j)(10)(J)(ii)(II) (West Supp. 1995).

<sup>25</sup>. 13 C.F.R. § 121.103(b)(2) (1996).

<sup>26</sup>. 13 C.F.R. § 124.112(c)(2)(iii) (1996).

<sup>27</sup>. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 428 (1994) ("Fifth MO&O").

<sup>28</sup>. See D. E. F Block Order, 11 FCC Rcd at 7842; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 155-56 (1995) ("Sixth Report and Order").



affiliation rules in which it retained the tribal affiliation exemption on which the Commission's rule is based.<sup>29</sup>

Against this background, a small business preference program for the auction of WCS spectrum must include the tribal affiliation exemption featured in Section 24.720(1)(11)(i) of the Commission's Rules. Discussing the SBA rules in 1994, the Commission noted that the employment of its own tribal affiliation exemption "is consistent with these other Federal policies and complies with the congressional mandate in the auction law."<sup>30</sup> In 1995, the Commission explained that its "decision to exempt Indian tribes generally from our affiliation rules was premised on the fact that Congress has imposed unique legal restraints on the way they can utilize their revenues and assets."<sup>31</sup> Earlier this year, no party opposed the Commission's decision to apply its tribal affiliation exemption to the auction of broadband PCS F block spectrum.<sup>32</sup>

Today, Congress has directed the Commission to auction 30 MHz of spectrum "pursuant to section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j))."<sup>33</sup> Plainly, the same interests

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<sup>29.</sup> See 13 C.F.R. § 121.103(b)(2) (1996); 61 Fed. Reg. 3280, 3287 (1996).

<sup>30.</sup> Order on Reconsideration, 9 FCC Rcd at 4494 (footnotes omitted).

<sup>31.</sup> Sixth Report and Order, 11 FCC Rcd at 156.

<sup>32.</sup> D, E, F Block Order, 11 FCC Rcd at 7840-41.

<sup>33.</sup> Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009 (1996).

that obtained in 1994, and again in 1995 and 1996, apply with equal force in this context. Pursuant to Section 309(j) of the Communications Act, the Commission must design a system of competitive bidding to disseminate licenses among a wide variety of applicants, including — at a minimum — small businesses. In connection therewith, the Commission must apply its well justified tribal affiliation rule to be consistent with "other Federal policies and . . . the congressional mandate in the auction law."<sup>34</sup>

#### **IV. LICENSING WCS SPECTRUM**

##### **A. WCS Spectrum Should Count Against the CMRS Spectrum Cap with a Limited Safe Harbor**

Finally, to the extent the WCS spectrum is used for currently recognized CMRS purposes, WCS spectrum should count against the Commission's 45 MHz CMRS spectrum cap. Enforcing the cap in connection with WCS will permit new entrants to acquire spectrum useful for CMRS and will help to guard against the domination of mobile services by existing CMRS providers.

At the same time, however, current and prospective licensees did not anticipate the availability of additional CMRS spectrum when forming business plans for wireless services. Thus, CIRC urges the Commission to create a safe harbor for licensees whose CMRS spectrum holdings in excess of 45 MHz do not cover more than 10 percent of the POPs nationwide. That is, the Commission should permit an entity to hold CMRS spectrum in excess of 45 MHz

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<sup>34</sup>. Order on Reconsideration, 9 FCC Rcd at 4494 (footnotes omitted).

in areas with 10 percent or less of the national population. An entity with CMRS authorizations covering 25 percent of the nation's POPs, for example, will be permitted to exceed the spectrum cap in areas that include up to 10 percent of the nation's POPs, but will be subject to the cap for its remaining service areas.

V. CONCLUSION

For these reasons, CIRI urges the Commission to include a small business preference component in its auction rules for WCS spectrum, to offer substantial bidding credits to small businesses in the WCS auction, to include its existing tribal affiliation exemption in those small business provisions, and to regulate the use of WCS spectrum to provide commercial mobile services under the CMRS spectrum cap.

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